

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

HERIBERTO RODRIGUEZ)	
Petitioner,)	
)	
v.)	CRIMINAL NO. 5-40006-FDS
)	
UNITED STATES OF AMERICA,)	
Respondent.)	

MOTION TO CORRECT
SENTENCE UNDER 28 U.S.C. § 2255

Petitioner, Heriberto Rodriguez, respectfully moves that this Court correct his sentence, pursuant to 28 U.S.C. § 2255. As grounds for this motion, defendant states as follows:

1. On September 24, 2007, this Court sentenced Mr. Rodriguez to 180 months imprisonment, the mandatory minimum sentence, after determining that he was an armed career criminal under 18 U.S.C. § 924(e). See judgment, Criminal No. 05-40006-FDS.

2. The classification of Mr. Rodriguez as an armed career criminal resulted from three convictions: a conviction for resisting arrest in 1999, PSR, ¶ 33, a conviction for mayhem, assault and battery by dangerous weapon and unarmed robbery in 2000, PSR, ¶ 37, and a conviction for assault and battery by dangerous weapon in 2004, PSR, ¶ 40.

3. On March 31, 2008, the Massachusetts Appeals Court reversed the denial of a motion for a new trial in the 2004 conviction for assault and battery by dangerous weapon and

remanded the matter for a new trial. See Notice of Docket Entry and decision in case no. 07-P-801, attached hereto as Exhibit A and denial of Commonwealth's Application for Further Appellate Review, attached hereto as Exhibit B. The conviction was vacated based on the defendant's brief and argument that the pleas to those charges were not knowingly, intelligently, and voluntarily made, a constitutional requirement. There were two bases for this argument: 1) that Mr. Rodriguez did not admit to the facts constituting the elements of the offense and 2) there were insufficient facts presented during the plea colloquy to establish each element of the subject offense. Specifically, there was insufficient evidence that Mr. Rodriguez intentionally committed an assault and battery or that he intentionally acted recklessly causing an injury that was more than "trifling or transient." See Exhibit A adopting the arguments in defendant's brief. The Court of Appeals agreed with both arguments. "[T]he record must show that the defendant admitted to facts constituting the unexplained elements or stipulated to such facts with respect to the subject offense. . . . The record does not and, accordingly, the defendant's conviction upon his plea must be vacated. Commonwealth v. Correa, 43 Mass.App.Ct. at 717." Id. The court further held, "[a]dditionally, we agree with the defendant that there were insufficient facts presented to

establish each element of the subject offense. Commonwealth v. Delverde, 398 Mass. at 296-297." Exhibit A.

4. Without the 2004 assault and battery by dangerous weapon conviction, Mr. Rodriguez is not subject to the provisions of 18 U.S.C. § 924(e), the armed career criminal statute. Where a state conviction which operated as a predicate offense is vacated post sentencing, the armed career criminal statute is no longer applicable and the defendant must be resentenced. Under United States v. Pettiford, 101 F.3d 199 (1st Cir. 1996) (permitting re-sentencing of prisoner sentenced under Armed Career Criminal Act, relying upon United States v. Custis, 511 U.S. 485 (1994)) and United States v. Brackett, 270 F.3d 60 (1st Cir. 2001) (extending Custis to sentencing guidelines), he is entitled to be re-sentenced. See also Mateo v. United States, 398 F.3d 126 (1st Cir. 2005).

5. The Presentence Report ("PSR") calculated Mr. Rodriguez's total offense level, prior to application of the armed career criminal guideline, as 23. PSR, ¶ 24.

6. The PSR calculated Mr. Rodriguez's Criminal History Category to be V based upon 12 criminal history points. PSR, ¶ 45. Without the 2004 conviction for assault and battery by dangerous weapon there are 8 criminal history points which reduces the Criminal History Category to IV.

7. With a total offense level of 23 and a criminal history category of IV, Mr. Rodriguez's guideline range would be 70-87 months.

CONCLUSION

For the reasons set forth above, Mr. Rodriguez contends that this Court should schedule a hearing so that he may be re-sentenced. (Mr. Rodriguez is currently incarcerated at USP Lewisburg.)

HERIBERTO RODRIGUEZ
By his attorney,

/s/ Catherine K. Byrne
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CERTIFICATE OF SERVICE

I, Catherine K. Byrne, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on August 8, 2008.

/s/ Catherine K. Byrne
Catherine K. Byrne

Exhibit A

Westlaw.

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71 Mass.App.Ct. 1116, 883 N.E.2d 343, 2008 WL 859479 (Mass.App.Ct.)

(Table, Text in WESTLAW), Unpublished Disposition
71 Mass.App.Ct. 1116, (Mass.App.Ct.)2008 WL 859479**H**

Com. v. Rodriguez

Mass.App.Ct.,2008.

NOTICE: THIS IS AN UNPUBLISHED OPINION.

Appeals Court of Massachusetts.

COMMONWEALTH,

v.

Heriberto RODRIGUEZ.

No. 07-P-801.

March 31, 2008.

MEMORANDUM AND ORDER PURSUANT TO
RULE 1:28

*1 On December 3, 2004, the defendant pleaded guilty to assault and battery by means of a dangerous weapon, G.L. c. 265, § 15A (the subject offense).^{FN1} Thirty-three months later the defendant filed a motion for new trial, Mass.R.Crim.P. 30(b), 435 Mass. 1501 (2001), asserting that his plea was not intelligently made because he did not have knowledge of the elements of the charges against him, and, additionally, that there was no factual basis for the subject offense. As to the first point, the defendant cited to *Boykin v. Alabama*, 395 U.S. 238 (1969), and *Commonwealth v. Correa*, 43 Mass.App.Ct. 714 (1997). In support of the second assertion, the defendant cited to *Henderson v. Morgan*, 426 U.S. 637, 645-646 (1976), *Commonwealth v. DelVerde*, 398 Mass. 288 (1986), and Mass.R.Crim.P. 12(c)(5)(A), 378 Mass. 869 (1979). By written order the District Court judge denied the motion for new trial and also denied the defendant's motion for reconsideration of that ruling.^{FN2} We reverse.

FN1. There were multiple companion offenses to the subject offense. Resolutions of those charges, however, are not part of this appeal.

FN2. A transcript of the plea hearing was

submitted with the motion for new trial.

Background. The defendant was driving a car which was being pursued by Fitchburg police Sergeant Howe. After attempting to evade the police, the defendant was forced to stop by the police cruiser. The defendant put his vehicle into reverse, striking the police cruiser, and causing it to be pushed. The defendant then left the scene, but shortly thereafter was captured and arrested after his car struck a cement wall.

At the time of plea, the judge began the plea colloquy with the defendant by questioning him about his waiver of trial rights, the voluntariness of his plea, and his understanding of the proposed sentence, which was an assented-to recommendation. Toward the end of the plea colloquy, the judge asked the prosecutor to "tell me the facts." The transcript reads, in pertinent part:

PROSECUTOR: "Apparently, the officer, at some point, does cut him off and gets out of his vehicle, the Defendant then slams-apparently, puts his vehicle into reverse, and believes it as a result rammed into the cruiser and caused Sergeant Howe to sustain some minor injuries. Sergeant Howe's vehicle is being pushed. Sergeant Howe thought he was going to be severely hurt, he had banged his head on the window, police radio had fallen from his hands...."

[There follows a recitation of further facts not relevant to the subject offense, and some discussion of the other charges.]

THE COURT: "Mr. Rodriguez, is this about the deal?"

DEFENDANT: "Is this what?"

THE COURT: "Is this about what happened?"

DEFENDANT: "Yeah, yeah. It's pretty accurate."

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71 Mass.App.Ct. 1116, 883 N.E.2d 343, 2008 WL 859479 (Mass.App.Ct.)

(Table, Text in WESTLAW), Unpublished Disposition

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After that admission, the judge sentenced the defendant and concluded the hearing.

END OF DOCUMENT

Discussion.

1. *Knowledge of the elements of the offense.* The judge did not explain the elements of the subject offense to the defendant, nor did the judge obtain a representation that defense counsel had done so. Accordingly, for this colloquy to satisfy the requirements of *Henderson v. Morgan*, 426 U.S. at 645-646, and *Commonwealth v. McGuirk*, 376 Mass. 338, 343-344 (1978), the record must show that the defendant admitted to facts constituting the unexplained elements or stipulated to such facts with respect to the subject offense. *Id.* The record does not and, accordingly, the defendant's conviction upon his plea must be vacated. *Commonwealth v. Correa*, 43 Mass.App.Ct. at 717.

*2 We rely upon the reasoning and authorities on pages 16 through 22 of the defendant's brief in agreeing that the defendant did not admit to facts constituting the elements of the subject offense.

2. *Factual basis.* Additionally, we agree with the defendant that there were insufficient facts presented to establish each element of the subject offense. *Commonwealth v. Delverde*, 398 Mass. at 296-297. We rely upon the reasoning and authorities contained in the defendant's brief at pages 22 and 23, with reference back to pages 16 through 22, as well.

3. *Conclusion.* The order denying the defendant's motion for a new trial is reversed. The judgment is reversed, and the finding on the subject offense is set aside. The case is remanded to the District Court for a new trial.

So ordered.

Mass.App.Ct.,2008.

Com. v. Rodriguez

71 Mass.App.Ct. 1116, 883 N.E.2d 343, 2008 WL 859479 (Mass.App.Ct.)

Exhibit B

Supreme Judicial Court for the Commonwealth of Massachusetts

John Adams Courthouse

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RE: Docket No. FAR-16971

COMMONWEALTH

vs.

HERIBERTO RODRIGUEZ

Fitchburg District, WO No. 0416CR001613
A.C. No. 2007-P-0801

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on July 23, 2008, the above-captioned Application for Further Appellate Review was denied.

Susan Mellen, Clerk

Dated: July 23, 2008

To: Donna-Marie Haran, A.D.A.
Martin J. Vogelbaum, Esquire